In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 170

THE UNITED STATES OF AMERICA, PETITIONER

v.

PENNER INSTALLATION CORPORATION

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR REHEARING

The Solicitor General on behalf of the petitioner, the United States of America, respectfully prays for a rehearing of this case before a full bench.

Certiorari was granted in this case on October 9, 1950, with all justices participating. Journal, Supreme Court, p. 5. The case was argued on November 30, 1950, before a bench comprised of eight justices. The Chief Justice was not sitting on that day. Journal, Supreme Court, p. 78. A judgment of affirmance by an evenly divided court of eight justices was entered on December 11, 1950, with a notation that the Chief Justice took no part in the consideration or decision of the case. Journal, Supreme Court, p. 89.

This petition for rehearing is predicated on the assumption that the Chief Justice took no part only because of his absence from the bench during the oral argument of this cause. In the light of the Chief Justice's participation in the granting of the writ, it would appear that an argument could be had before the full bench, should rehearing be authorized.

This case basically involves the questions (1) whether a decision of an administrative official of the Government, made final by the terms of the contract, may be set aside on any ground other than bad faith or error so gross as necessarily to imply bad faith, and (2) whether it must appear from the findings of the Court of Claims that the evidence, upon which the court bases its finding of gross error such as necessarily implies bad faith, is the same as that which was before the contract arbiters. These questions are of great importance in the conduct of Government litigation before the Court of Claims in cases involving contractual provisions making the findings of designated Government officials final. Since its decision in the *Penner* case, the Court of Claims, in the *Great Lakes Dredge and Dock Co.* v. *United States,* 90 F. Supp. 963, and *Martin Wunderlich* v. *United States,* Court of Claims No. 46307, decided June 5, 1950, has relied upon its opinion in the *Penner* case in disregarding a finding made by a contracting officer and approved by the head of the department. It is reasonably

to be anticipated that the question will be constantly recurring and one which this Court ultimately will be called upon to resolve.

This Court has frequently granted rehearing following a decision by an equally divided Court, especially when a justice who did not participate in the original decision is available for the rehearing. *Home Insurance Co.* v. *New York,* 119 U. S. 129, 148; 122 U. S. 636; 134 U. S. 594. *Selma, Rome & Dalton R. R. Co.* v. *United States,* 122 U. S. 636–637; 139 U. S. 560. *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, 586; 158 U. S. 601, 602–607. *United States* v. *Grimaud,* 216 U. S. 614, 615; 220 U. S. 506. *United States* v. *Sischo,* 260 U. S. 697–698; 260 U. S. 701; 262 U. S. 165. *United States* v. *One 1936 Model Ford V–8 De Luxe Coach,* 305 U. S. 564; 305 U. S. 666; 307 U. S. 219; *Halliburton Co.* v. *Walker,* 326 U. S. 696; 327 U. S. 812; 329 U. S. 1; *MacGregor* v. *Westinghouse Electric & Mfg. Co.,* 327 U. S. 758; 327 U. S. 812; 329 U. S. 402; *Bruce's Juices* v. *American Can Co.,* 327 U. S. 758; 327 U. S. 812; 330 U. S. 743. This case is an appropriate one for like action. If the finality provisions of government contracts are to be disregarded whenever the Court of Claims differs sharply from the factual findings made by the designated arbiters, and the contractual provisions whereby the Government has undertaken to reduce litigation to a minimum thus drastically undermined, that consequence should follow,

if it must, from an opinion of this Court, if an equal division is avoidable.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

I certify that this petition is presented in good faith and not for delay.

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1950.

U. S. GOVERNMENT PRINTING OFFICE 1950

No. 170

Office - Supreme Court, U. S.
FILED
JAN 4 1951
CHARLES ELMORE CROPLEY

Supreme Court of the United States

October Term, 1950

THE UNITED STATES OF AMERICA,
Petitioner,

—against—

PENNEY INSTALLATION CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR REHEARING

The respondent respectfully submits that a rehearing in the instant matter is not justified.

The decision of the Court of Claims as affirmed by an equally divided Court is as important to respondent and other contractors doing business with the Government as it is to the Government. This fact in and of itself, we submit, does not justify a rehearing, any more than a rehearing is justified in every case decided by this Court. There is no question that every case before this Court is of the utmost importance to both parties involved. This, however, does not justify a rehearing.

If this Court desired a rehearing, it would have ordered it without waiting for application of counsel. *Brown* v. *Aspeden*, 55 U. S. 25; *St. Louis Public Schools* v. *Walker*, 9 Wall 603.

We have carefully examined the cases cited by petitioner in support of its argument that this Court has

granted rehearing following a decision by an equally divided Court. *Everyone of the cases cited by petitioner deals with either a constitutional question or the interpretation of a federal statute or both.*

As stated by Mr. Chief Justice Waite in the cases of *Shreveport* v. *Holmes; Shreveport* v. *Crooks; Shreveport* v. *Carter,* 125 U. S. 694:

> "These petitions are denied. The rehearing was granted in Holmes Insurance Company v. New York, 119 U. S. 129, after a decision by a divided Court, because an important constitutional question was involved. The question in these cases are not of that character."

The identical situation exists in the instant matter.

It is respectfully submitted that the petition should be denied.

Respectfully submitted,

ALBERT FOREMAN,
Attorney for Respondent.

M. CARL LEVINE, MORGULAS & FOREMAN,
Attorneys.